January 31, 2003

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Room TW – A325
Washington, DC 20554

Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 ("TCPA") CG Docket No. 02-278 – Reply Comments

Dear Ms. Dortch:

Set forth herein are the Reply Comments of MBNA America Bank, N.A. ("MBNA", "the Company") on the Notice of Proposed Rulemaking ("NPR") issued by the Federal Communications Commission ("FCC"; "Commission") regarding rules and regulations implementing the Telephone Consumer Protection Act ("TCPA"; "TCPA Rules"). *

Overview of MBNA Reply Comments

MBNA's Reply Comments address primarily the following points:

1. The company-specific do-not-call ("DNC") system fairly and reasonably balances the rights of legitimate telemarketers with the privacy interests of consumers. A national DNC system does not.

2. A national DNC list violates the First Amendment by imposing impermissible restrictions on the commercial speech rights of telemarketers.

3. The FCC should reaffirm its exclusive jurisdiction over interstate telemarketing; declare that telemarketers are not required to comply with state DNC laws to the extent that state authorities seek to enforce those laws against interstate telemarketing; and direct states to discontinue enforcement of their DNC laws against interstate telemarketing activities.

*MBNA incorporates herein by reference its comments dated 12/9/02 (as revised 12/10/02) ("MBNA/FCC"), and makes reference to the comments dated 12/9/02 submitted by the National Association of Attorneys General ("NAAG/FCC"); and the comments dated 12/9/02 submitted by the American Teleservices Association (ATA/FCC").

1. The company-specific DNC system fairly and reasonably balances the commercial speech rights and economic interests of legitimate telemarketers with the privacy rights of consumers. A national DNC system does not.

The TCPA and TCPA Rules are replete with clear statements and affirmations of certain basic findings and principles that Congress determined should guide the regulation of telemarketing:

- Telemarketing is a legitimate industry that serves a valuable role in the economy;
- Legitimate telemarketers have commercial speech rights and economic interests that are entitled to recognition and accommodation; and
- Telemarketing regulations must reflect a careful weighing and balancing of the rights of legitimate telemarketers with the privacy rights of consumers. [1]

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[1] "Individuals' privacy rights, public safety interests and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices" TCPA, §2(a).

* * *

"In this proceeding, we analyze the costs and benefits associated with each of the alternatives for meeting the goals of the TCPA. The rules we adopt attempt to balance the privacy concerns which the TCPA seeks to protect, and the continued viability of beneficial and useful business services." TCPA Report & Order, 7 FCC Rcd at 8754 (emphasis supplied)

* * *

"The company-specific approach "most effectively balances the privacy interests of residential subscribers who wish to avoid unwanted solicitations . . . against the interests of telemarketers in maintaining useful and responsible business practices and of consumers who do wish to receive solicitations . . ." Id at 8757-58 (emphasis supplied)

* * *

"Both Congress and the Commission have found telemarketing serves a valuable role in our economy . . ." Id at 8783

"Our objective in this proceeding has been to hold telemarketers accountable for their activities without undermining the legitimate business efforts of telemarketing." Ibid.

* * *

"In crafting these provisions, I was mindful of the need to strike a reasonable balance between privacy rights, public safety interests, and commercial freedoms of speech and trade, which Congress cited as a primary concern in enacting the 1991 Act." (Statement of Commissioner Andrew C. Barrett) Id. at 8795 (emphasis supplied). See also 8781

The Commission adhered carefully to the above principles in crafting an appropriate approach to the DNC issue, and concluded:

> "In sum, the company-specific do-not-call list alternative represents a careful balancing of the privacy interests of residential telephone subscribers against the commercial speech rights of telemarketers and the continued viability of a valuable business service. For these reasons, we conclude that the company-specific do-not-call list is the alternative that best accomplishes the purposes of the TCPA." TCPA Report and Order, 7 FCC Rcd at 8766 (emphasis supplied).

Given Congress' concern that a reasonable balancing of rights be struck and maintained, and the Commission's careful attention to that concern in its analysis of the do-not-call issue in 1991 and again in 1995, the Commission should not adopt a national DNC list unless the record in this proceeding demonstrates that:

- The existing company-specific DNC system no longer adequately protects consumer privacy; and
- A national DNC registry is both reasonable and necessary; and
- Implementation of a national DNC registry will not upset the Congressionally mandated balance between "the privacy rights of residential telephone subscribers" and "the commercial speech rights of telemarketers and the continued viability of a valuable business service"

MBNA respectfully submits that proponents of a national DNC registry have the burden of establishing their case on each of the above issues, and that they have failed to do so in any respect.

(a) The company-specific DNC system continues to adequately protects consumer privacy.

In its original comments, MBNA discussed at some length how the advantages of the company-specific DNC approach identified by the Commission in 1991 remain valid today (MBNA/FCC, pp. 4-6). Proponents of the national DNC approach have not addressed, much less disputed, the Commission's findings in this area. Rather, they have focused on a few points that require further comment.

- The argument is made that the company-specific DNC approach is "unreasonably burdensome" because a consumer must direct his/her request to each telemarketer, resulting in multiple requests. That, of course, was known and understood by Congress when it adopted the company-specific approach, one of the purposes of which is to preserve consumer freedom of choice. Moreover, each such request takes less than 5 seconds, the time it takes to speak the words "Please put me on your do-not-call list." Even assuming it took 15 seconds (from pickup to hang up) to make each request, it would take only 5 minutes, probably spread over months, to register for the DNC lists of 20 different companies. Can this fairly be considered "unreasonably burdensome", particularly in the face of the disadvantages of a national DNC registry and the significant economic harm it will likely cause?

- ➢ It is also argued that the company-specific approach is ineffective because more consumers would register for a national DNC list. In addition to ignoring the serious constitutional arguments raised by a national DNC list (and state DNC lists, for that matter), this argument reflects the attitude that
  - the goal of telemarketing regulation should be to prohibit as much speech as possible; and
  - telemarketers do not have speech rights and business interests that need to be balanced with consumer privacy rights. [2]

(b) A national DNC list has not been shown to be necessary or reasonable.
Proponents of a national DNC registry argue that only such an approach will adequately protect consumer privacy. In so doing, they simply ignore alternate approaches and other circumstances that favor retention of the company-specific DNC approach.

- ➢ **A national DNC registry will be costly to establish and maintain, and this cost will be borne by telemarketers.**
  The FTC is requesting $16 million in funding for its national DNC, but has provided no data indicating that this figure is accurate or adequate. Indeed, most commenters believe the figure is low and unrealistic. However, since all such costs are ultimately to be recouped from the telemarketing industry in the form of user fees, it is likely that the inaccuracy of the FTC's cost estimates will be "cured" by increasing the industry cost burden, a burden that is already increasing inexorably as telemarketers work to comply with a potpourri of state DNC laws that have differing definitions, exemptions, exceptions, penalties, etc. These user fees could well become so high that telemarketing becomes uneconomical, with the result that some companies cease to use the telemarketing channel while others, most of them small, are driven out of business. While that eventuality appears perfectly acceptable to certain proponents of a national DNC registry, it certainly was not envisaged by Congress when it mandated a "balancing of rights" approach to the DNC issue.

- ➢ **A national DNC list will be difficult to maintain in accurate form.**
  When the Commission raised this issue in 1991, there were no state DNC lists which now have to be integrated into, and harmonized with, any national DNC list. MBNA submits that the initial integration/harmonization process, continued updating of consumer information (additions; deletions; revisions; corrections), and coordination of enforcement will be far more difficult and complex than national DNC list proponents have been willing to admit. [3]

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[2] This attitude is clearly evident in the comments of the National Association of Attorneys General ("NAAG"), which make no reference to a balancing of rights; declare that consumers' interests and privacy rights are to be "paramount" (NAAG/FCC, pp. 5, 7); state that "The ability to keep uninvited marketers out of one's home is an issue of consumer sovereignty and autonomy. . ." (id. at p. 6); refer approvingly to ". . . the public outcry for improved protection against these abusive and pervasive intrusions into homes by uninvited telemarketers." (id. at p. 5); and appear to take the position that telemarketers improperly use consumer property – the telephone – " . . . adding elements of both trespass and conversion when the telemarketer intrudes without permission" (id. at p. 6). It is not clear whether NAAG is advocating that telemarketing should be prohibited except to consumers who have previously given their express consent.

[3] For example, the state AGs envision a DNC system that involves 2 federal lists (FTC; FCC); up to 50 state DNC lists; and company-specific DNC lists. Their description of how all these lists would be integrated, coordinated and harmonized for list management and enforcement purposes raises a myriad of issues, but resolves none. See NAAG/FCC, pp. 14-21.

- **The Commission should fully consider available alternatives before abandoning the company-specific DNC approach**

  Proponents of a national DNC approach make no attempt to analyze how alleged shortcomings in the company-specific DNC approach could be addressed. Instead, they simply adopt the uncompromising position that the company-specific approach is inefficient and must be replaced. In contrast, the Commission in 1991 anticipated possible issues related to the company-specific approach and suggested steps that could–and should–be taken to address them:

  - **Increase consumers' awareness of their rights to register on company-specific lists**

    The Commission expressed its concern "that consumers be fully informed of their rights under the TCPA" and stated that "we will work with consumer groups, industry associations, local telephone companies, and state agencies to assure that the rules we adopt today are well publicized" 7 FCC Rcd at 8781.

    MBNA respectfully submits that the public information programs anticipated by the Commission have not been implemented, with the result that consumer awareness of the company-specific approach is not as widespread as anticipated, and fewer consumers have registered on company-specific lists than would otherwise have been the case. The Commission, in conjunction with the telemarketing industry, should generate those public information programs and measure their results before taking the radical step of abandoning the company-specific DNC approach as ineffective.

  - **Provide an analysis of consumer complaints to guide corrective actions**

    The Commission also stated:

    > "We also will monitor closely any reports of alleged violations of the TCPA or the rules that are filed with the Commission to determine whether additional action is necessary to protect consumers from unwanted solicitations." Ibid.

    MBNA is not aware of data on, or analyses of, consumer complaints about the company-specific DNC approach that would justify its abandonment, but understands that ATA has requested copies of the complaints referred to in the Commission's NPR. The Commission should not consider final action in this proceeding unless and until MBNA and other parties have had the opportunity to analyze and comment upon those complaints.

- **Involve the telemarketing industry in devising solutions to implementation issues.**

  The Commission anticipated that, if implementation issues arose, they could be addressed by a

  > " . . . cross-industry board or advisory council to evaluate the complaints received and recommend effective solutions. Both Congress and the Commission have found telemarketing serves a valuable role in our economy, and it is appropriate for responsible telemarketers, who benefit from the activity, to devise solutions to problems.
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  > * * *
  >
  > Our objective in this proceeding has been to hold telemarketers responsible for their activities without undermining the legitimate business efforts of telemarketing." Ibid. (emphasis supplied).

  In this spirit, MBNA requests that, before reaching any final decision respecting possible changes to its existing DNC regulations, the Commission meet and consult with industry representatives and other appropriate parties in interest to consider and evaluate measures to improve the effectiveness of the company-specific DNC approach, including (but not limited to):

  - Cooperative efforts to inform and educate consumers about their right to register on company DNC lists;
  - Measures to facilitate the consumer registration process;
  - A specific time-frame for companies to process DNC registration requests;
  - Specific measures to assist disabled telephone subscribers;
  - Appropriate "safe harbor" rules.

  MBNA believes that Commission-industry consultation and cooperation have always been an essential part of the letter, spirit and intent of the TCPA and TCPA Rules. Unfortunately, proponents of a national DNC list prefer a government-created and administered approach.

(c) Implementation of a national DNC registry will upset the Congressionally mandated balance between "the privacy rights of residential subscribers" and "the commercial speech rights and the continued viability of a valuable business service"

As discussed previously, Congress and the Commission always intended that a balancing of rights would be the basis for telemarketing regulation and that such regulation would respect both the commercial speech rights and the economic interests of the telemarketing industry. A national DNC registry respects neither. [4]

[4] Discussion of how a national DNC registry violates the First Amendment by impermissibly restricting commercial speech is contained in Section 2, infra.

Evaluation of the economic impact of a national DNC approach should include consideration of the following:

(i) **Impact on consumers.** A contraction in the telemarketing industry resulting from increased regulation could significantly impact consumers in at least 2 ways:

- **A decline in telemarketing generally**, including telemarketing to consumers who want to receive calls and to evaluate products and services offered through that marketing channel; and

- **Reduced availability of products and services** that are offered exclusively, or primarily, through the telemarketing channel, resulting in reduced competition and higher consumer prices.

(ii) **Impact on the telemarketing industry,** including

- **Loss of revenues.** The impact of a national DNC on the revenues of MBNA and other legitimate telemarketers could be very significant, perhaps threatening the economic viability of this important marketing channel.

- **Increase in costs**. User fees, compliance costs and related expenses will increase the burden on telemarketers, but no reliable data or projections measuring this financial impact have been produced.

- **Business failures; job losses**. There are more than 30,000 companies engaged in telemarketing in the U.S., many of them small businesses.[5] They employ more than 5 million people, many of whom are in the most economically vulnerable categories. [6] Implementation of a national DNC registry could bring about a major contraction in the telemarketing industry, resulting in both business failures and job losses.

(iii) **Impact on overall economic activity,** including an adverse impact on consumer spending. Business-to-consumer teleservices is one of the fastest growing industries in the United States and is the country's largest direct marketing system, producing more than $275 billion in annual revenue. It employs more than 5.4 million people nationwide. Outbound telemarketing alone contributed nearly 4 percent of all consumer sales in 2001. (See ATA/FCC, p. 10, citing DMA study, The Faces and Places of Outbound Teleservices in the United States: The People and Places that Would be Harmed by a Decline in Telemarketing.)

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[5] Approximately 1800 (75%) of ATA's 2500 members are "small businesses", as defined by the SBA.

[6] According to a recent study, almost 60% of those employed by outbound telemarketing firms are women, of whom 62% are working mothers, and just over 25% are single working mothers. A similarly significant percentage of telemarketing employees belong to minority groups. Telemarketing also provides needed earning opportunities to retirees seeking supplemental income, working students, and others who can work only part-time and need flexible work schedules.

> Clearly, any regulatory action that could impact such an important part of the nation's economic structure must be carefully scrutinized, and the impact carefully calculated. In doing so, the Commission cannot assume that adverse economic effects resulting from a decline in telemarketing activity will be offset by increases in activity elsewhere (e.g. advertising; direct mail), since such an assumption ignores the reality that telemarketing is far more effective than other marketing channels.

The issue is not whether the Commission agrees with the forecasts of adverse economic impact resulting from a national DNC registry. Rather, the issue is whether the Commission can fairly and properly reach a decision on DNC regulation without undertaking a careful analysis of that impact. MBNA believes such study and analysis is essential to the balancing process mandated by Congress.

2. A national DNC list violates the First Amendment by imposing impermissible restrictions on the commercial speech rights of telemarketers

The basis of the protection afforded by the First Amendment is the value of speech, not its popularity. This distinction has largely been ignored by proponents of a national DNC registry, who denigrate the value of telemarketing speech because some consumers object to it, even as they demand even greater protection for the right of consumers not to be annoyed by commercial telephone calls.

Congress recognized that the "balancing of rights" process it mandated could have constitutional implications and delegated to the Commission primary responsibility for ensuring that TCPA regulations met constitutional standards:

> "With respect to the provisions to protect residential customers' privacy rights, the Committee believes that the reported bill provides the FCC with sufficient direction and flexibility to design regulations that will be fully consistent with the Constitution. The legislation directs the FCC to balance individual privacy rights, public safety interests, and commercial freedoms of speech and trade. The Committee expects the Commission will issue regulations that protect subscribers' privacy rights without intruding unnecessarily and inappropriately on the First Amendment rights of the speaker." S Rpt. 102-177 at 6 (emphasis added)

MBNA believes strongly that a national DNC registry would impermissibly restrict commercial speech and thus violate the First Amendment. The Company endorses the position and arguments on this issue set forth in lawsuits filed by this week ATA and DMA challenging the FTC's DNC list. Mainstream Marketing Services, Inc., et al v. Federal Trade Commission, et al (DC Colo.; filed Jan. 29, 2003); U.S. Security, et al v. Federal Trade Commission (WD OK; filed Jan. 29, 2003).

3. The FCC should affirm its exclusive jurisdiction over interstate telemarketing.

The comments of the state Attorneys General ("state AGs"), as well as the enforcement actions themselves that states have brought against telemarketers for alleged violations of their DNC laws, make clear that they consider those laws to have extra-territorial effect, i.e. they apply to both interstate and intrastate telemarketing activities. To protect that position, the state AGs argue at length that the Commission must not, indeed cannot, preempt state DNC laws.

The position that state DNC laws have interstate application is simply wrong. And the argument that state DNC laws cannot be preempted misses the point.

(a) States are applying their DNC laws to interstate telemarketing

It is clear that some state DNC laws are being applied to, and enforced against, interstate telemarketing activities.

- The provisions of most state DNC laws do not contain language limiting their application to in-state telemarketers who call state residents. On the contrary, the statutes apply by their terms to all (non-exempted) commercial telemarketing calls to state residents. The public pronouncements of state AGs and other state officials about their DNC laws uniformly refer to their intended effect on "telemarketing", with no distinction between intrastate and interstate calling.

- The state AGs themselves state: "Nationwide, more than 300 enforcement actions have been taken against telemarketers, with nearly half of this number involving telemarketing companies calling from across state lines." (NAAG/FCC, p. 12, fn. 34). Contrary to their contention, the fact of these enforcement actions provides no legal support for the states' assertion of jurisdiction over interstate telemarketing.

(b) The Communications Act of 1934 ("Communications Act") and the TCPA establish the FCC's exclusive jurisdiction over interstate telemarketing.

A clear statement of the Commission's exclusive jurisdiction over interstate telephone communications is contained in Operator Services Providers of America/Petition for Expedited Declaratory Ruling, Memorandum Opinion and Order, 6 FCC Rcd 4475 (1991) ("OSPA"). In that proceeding, the Commission determined that the Communications Act [7] and TOCSIA [8] independently established the Commission's exclusive jurisdiction over interstate communications, and precluded application of a Tennessee statute to interstate operator services. Because OSPA is so similar to the situation at hand, it is instructive to examine the Commission's opinion in some detail.

- The Commission first determined that, as here, the state statute did in fact apply to both intrastate and interstate calls. (OSPA, ¶ 6)

- The Commission then moved to an analysis of the Tennessee statute in relation to the Communications Act and reiterated that

> " . . . the Commission has plenary and comprehensive jurisdiction over interstate and foreign communications, the regulation of which is

[7] 47 U.S.C. §151 et seq.

[8] Telephone Operator Consumer Services Improvement Act of 1990. 47 U.S.C. §226

> entrusted to the Commission. The Commission's jurisdiction over interstate and foreign communications is exclusive of state authority, Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications service may be offered in a state". (OSPA, ¶ 10) (citations omitted)

- Turning to TOCSIA, the Commission found that

> ". . . Congress viewed TOCSIA as establishing a 'regulatory framework' for the interstate operator services industry. . .

and concluded that

> ". . . Congress intended to, and did, create a comprehensive legislative solution to any problems in the interstate OSP industry – a federal solution that precludes a potpourri of differing state requirements applicable to interstate services." (OSPA, ¶ 14)

The Commission found further that the Tennessee statute could not apply to interstate operator services because it conflicted with federal law by standing " . . . 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' ". (OSPA, ¶ 16) In particular, the Commission noted that various requirements in the state statute differed from those in TOCSIA and that

> " . . . the Tennessee requirements . . . by virtue of being more burdensome than federal requirements, make impossible achieving the balance established by Congress between the degree of regulation and reliance on marketplace forces . . . " (OSPA, ¶ 16)

It would be difficult to develop a scenario that more closely mirrors the one described in OSPA than the application of state DNC laws to interstate telemarketing in the face of the Communications Act, TCPA and TCPA Rules. However, notwithstanding OSPA (which is not discussed or cited in NAAG's comments), states continue to enforce DNC laws against interstate telemarketers.

The Commission should put an end to debate on this issue once and for all, by declaring unequivocally that it has exclusive jurisdiction over interstate telemarketing, and that the application and enforceability of state DNC laws are limited to intrastate telemarketing. These jurisdictional declarations can be found in the Matise-to-Guns opinion letter dated 1/26/98, which is cited by the Commission (NPR, ¶ 66, fn. 220). That opinion cites OSPA, follows the reasoning used in OSPA, and concludes that:

> "The Communications Act, specifically Section 227 of the Act, establishes Congress' intent to provide for regulation exclusively by the Commission of the use of the interstate telephone network for unsolicited advertisements by . . . telephone . . ."
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> * * *
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> "The Communications Act . . . precludes Maryland from regulating or restricting interstate commercial telemarketing calls."

(c) States have no authority to exercise jurisdiction over interstate telemarketing.

The state AGs assert that "states can enforce their consumer protection statutes against out-of-state actors pursuant to their respective 'long-arm' statutes" (NAAG/FCC, p 12). Whatever the truth of that assertion in other contexts, no legal authority is cited for its application in the face of specific federal legislation that confers upon the FCC exclusive jurisdiction over interstate telephone communications in general (Communications Act, Sec. 2(a)), and interstate telemarketing in particular (TCPA).

The Commission dealt with an analogous argument in OSPA, where the state of Tennessee contended that the Commission did not have exclusive jurisdiction over interstate operator services because "states have authority to protect consumers against unfair, deceptive, and fraudulent practices of interstate carriers offering service in a state under Section 414 of the Communications Act" [9]. The Commission dismissed this argument, stating

> "Section 414 of the Act does not alter the grant of plenary authority to the Commission over interstate communications"
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> * * *
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> "Only Section 2(b)(1) of the Act limits the authority of the Commission, and that section reserves to the state authority over intrastate communications, not interstate communications" (OSPA, ¶ 11)

(d) The underlying issue is jurisdiction, not preemption.

The state AGs argue aggressively, and at great length, that the Commission cannot, and must not, preempt state DNC laws. [10] However, preemption is not the relevant issue where, as here, state DNC laws are being challenged because they purport to apply to interstate telemarketing, in conflict with the exclusive jurisdiction of the FCC. The Commission can and should resolve this conflict by reaffirming its exclusive jurisdiction over interstate telemarketing, by declaring that telemarketers are not required to comply with state DNC laws to the extent state authorities seek to apply those laws to interstate telemarketing, and by directing states to discontinue application and enforcement of their DNC laws against interstate telemarketing activities. Until the Commission takes those steps, legitimate telemarketers will continue to be subjected to ultra vires enforcement actions brought by state regulators.[11]

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[9] OSPA, ¶ 7. That section provides that the Communications Act does not "abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies" 47 U.S.C. Sec. 414.

[10] "The foremost concerns of the Attorneys General are to preserve the rights of the states to enforce their own laws."

* * *

"Of paramount importance to the Attorneys General is that the existing, or future, state do-not-call lists not be preempted or purportedly preempted." MAAG/FCC, p. 8.

[11] In its original Comments in this proceeding MBNA made the argument that there is need for a uniform national framework for the regulation of telemarketing, and that state DNC laws should be preempted (See MBNA/FCC, pp. 8-9). MBNA continues to maintain that position.

4. Conclusion

For the foregoing reasons, MBNA respectfully requests that the Commission refrain from taking any action with respect to the establishment of a national DNC list until it

(a) Completes a comprehensive analysis of the economic impact of a national DNC regime (pp. 7-8, supra);

(b) Consults with industry and other concerned parties concerning measures that would improve the effectiveness of the company-specific DNC approach (pp. 5-6, supra);

(c) Develops detailed forecasts of costs to be borne by telemarketers in the event a national DNC registry is created (p. 4, supra); and

(d) Provides interested parties with the complaints that formed the basis for the Commission's NPR (p. 5, supra).

Upon completion of the foregoing, MBNA requests the opportunity to provide further comments.

Respectfully submitted,

MBNA America Bank, N.A.

By /s/Joseph R. Crouse
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